Argued

Field J.

Affirmed by divided Court

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~290.~~ 92

HIRAM O. ALDEN, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF CHICOPEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

FILED NOVEMBER 15, 1870.

SUPREME COURT OF THE UNITED STATES.

No. 290.

HIRAM O. ALDEN, PLAINTIFF IN ERROR,

vs.

THE FIRST NATIONAL BANK OF CHICOPEE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

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1 *Complaint of error.*

United States of America, circuit court, first circuit.

To the hon. judges of the Supreme Court of the United States:

And now comes Hiram O. Alden, of Belfast, in said circuit, by Bion Bradbury, his attorney, and complains that in the record and proceedings, and also in the rendition of judgment in a cause or action of assumpsit between The First National Bank of Chicopee, plaintiffs, and the said Hiram O. Alden, defendant, tried in the circuit court of the United States for the first circuit, at a term thereof holden at Portland, within and for the district of Maine, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy, and in which judgment was rendered against him, the said Alden, on the sixteenth day of May of the same year, manifest error hath intervened to the great damage of the said Alden:

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States aforesaid.

HIRAM O. ALDEN,
By BION BRADBURY,
His Attorney.

OFFICE OF THE CLERK C. C. U. S.

MAINE DISTRICT, *ss:*

Received and filed May 26, 1870.
Attest: GEO. F. EMERY, *Clerk.*

A true copy of the original on file.
Attest: GEO. F. EMERY, *Clerk.*

2 *Bond.*

Know all men by these presents the we, Hiram O. Alden, of Belfast, in the district of Maine, as principal, and Erastus P. Carpenter, of Foxboro, in the county of , and Joel H. Hills, of Newton, in the county of Middlesex, in the Commonwealth of Massachusetts, as sureties, are holden and stand firmly bound and obliged unto The First National Bank of Chicopee, a corporation existing by force of the laws of the United States, and having its established place of business at Chicopee, in the Commonwealth of Massachusetts, in the sum of thirteen thousand dollars, to be paid to the said First National Bank of Chicopee, its successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals. Dated this twentieth day of May, in the year of our Lord eighteen hundred and seventy.

The condition of the foregoing obligation is such that whereas the said Hiram O. Alden has prosecuted a writ of error to the Supreme Court of the United States, returnable on the first Monday of December next, to reverse the judgment rendered against him on the sixteenth day of May aforesaid, in an action of assumpsit by the circuit court of the United States for the first circuit and district of Maine, (being No. 41 on the docket of continued actions of that court, for April term A. D. 1870:)

Now, therefore, if the said Hiram O. Alden shall prosecute his said writ of error to effect, and answer all damages and costs, if
3 he shall fail to make his plea good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

HIRAM A. ALDEN. [L. S.]
E. P. CARPENTER. [L. S.]
JOEL H. HILLS. [L. S.]

Signed, sealed, & delivered in presence of—
W. L. SHEPARD.

Approved:

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

OFFICE OF THE CLERK C. C. U. S.

MAINE DISTRICT, *ss:*

Received and filed May 26, 1870.
Attest: GEO. F. EMERY, *Clerk.*

A true copy of the original on file.
Attest: GEO. F. EMERY, *Clerk.*

4 *Writ of error.*

UNITED STATES OF AMERICA:

[SEAL.] The President of the United States of America to the justices of the circuit court of the United States for the district of Maine greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit court, between The First National Bank of Chicopee, a corporation existing by force of the laws of the United States, and having its established place of business at Chicopee, in the Commonwealth of Massachusetts, and citizens of the State of Massachusetts, plaintiffs, and Hiram O. Alden, of Belfast, in the county of Waldo, and State of Maine, and a citizen of said State of Maine, in our district of Maine, defendant, manifest error has intervened to the great damage of the said Hiram O. Alden, as by his complaint appears;

And as it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, you are hereby commanded that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning the same, and this writ, so that you have the same before the Supreme Court of the United States next to be holden at Washington, in the District of Columbia, on the first Monday of December next, that the record and process aforesaid being inspected they may cause to be done thereupon what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the United
5 States, at Portland, this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and seventy.

GEO. F. EMERY, *Clerk.*

Allowed by—

NATHAN CLIFFORD,
Associate Jus. Sup. Court U. S.

Return on writ of error.

CIRCUIT COURT OF THE UNITED STATES,
District of Maine ss:

And now here the justices of the circuit court of the United States in and for said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned, and of all proceedings therein.

In testimony whereof I, Geo. F. Emery, clerk of said circuit court, have hereunto set my hand and the seal of said court this first day of November, in the year of our Lord one thousand eight hundred and seventy.

[SEAL.] GEO. F. EMERY, *Clerk.*

6 *Copy of judgment.*

United States of America, Maine district, ss., first circuit.

At a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy: Present, the Honorable Nathan Clifford, associate justice of the Supreme Court, and the Honorable Edward Fox, district judge.

Con. 41

The First National Bank of Chicopee, a corporation existing by force of the laws of the United States, and having its established place of business at Chicopee, aforesaid, in the county of Hampden, and Commonwealth of Massachusetts, and a citizen of said State of Massachusetts, plaintiff, against Hiram O. Alden, of Belfast, in the county of Waldo, and State of Maine, in our district of Maine, and a citizen of said State of Maine, defendant, in a plea of the case, for that Edward Alden and J. H. Cousins, at Wilmington, Ill., to wit, at said Portland, on the first day of April, in the year of our Lord eighteen hundred and sixty-eight, by their note of that date, by them signed, for value received, promised Hiram O. Alden, the defendant, to pay him or his order, the sum of six thousand dollars in six months after the date thereof, at any bank in Boston, Mass., which time of payment has long since elapsed; and the said defendant thereafterwards, on the same day, by his endorsement of said note, in writing, ordered the contents thereof, then unpaid, to be
7 paid to the plaintiff, pursuant to the tenor of said note; and the plaintiffs thereafterwards, on the day when said note became payable, pursuant to the tenor thereof, presented said note to the said Edward Alden and J. H. Cousins, for payment, according to the tenor of the same, who then and there neglected and refused to pay the same; all of which the said defendant then and there had due notice, and thereby became liable, and in consideration thereof, then and there promised the plaintiffs to pay them the contents of said note, pursuant to the tenor thereof.

Also, for that Edward Alden and J. H. Cousins, at Wilmington, Ill., to wit, at Portland aforesaid, on the first day of April, in the year of our Lord eighteen hundred and sixty-eight, by their note of that date by them signed, for value received, promised the defendant to pay him

or his order the sum of six thousand dollars, in six months after the date thereof, at any bank in Boston, Mass., which time of payment has long since elapsed; and the said defendant thereafterwards, on the same day, by his endorsement of said note in writing, ordered the contents thereof then unpaid, to be paid to one William A. Ulmer; and the said William A. Ulmer thereafterwards, on the same day, by his endorsement of said note in writing, ordered the contents thereof then unpaid to be paid to The Ames Manufacturing Company; and thereafterwards, on the same day, The Ames Manufacturing Company, by W'm P. Elliott, their cashier, by their endorsement in writing, ordered the contents thereof then unpaid to be paid to the plaintiff, pursuant to the tenor
8 of said note; and the plaintiffs thereafterwards, on the day when said note became payable, pursuant to the tenor thereof, presented said note to the said Edward Alden and J. H. Cousins for payment, according to the tenor of the same, who then and there neglected and refused to pay the same; of all which the said defendant then and there had due notice, and thereby became liable, and in consideration thereof then and there promised the plaintiffs to pay them the contents of said note, pursuant to the tenor thereof. Yet he has not paid the same, to the damage of the said plaintiffs, as they say, the sum of twelve thousand dollars.

This action was entered at April term, in the year of our Lord one thousand eight hundred and sixty-nine, and was thence continued to September term then next ensuing. And now the said Alden comes and defends, when, &c., and for plea says he never promised the plaintiff in manner and form as he in his writ and declaration has alleged against him. And this he prays may be enquired of by the country.

By BRADBURY & BRADBURY,
His Att'ys.

And the plaintiffs doth the like.

By A. A. STROUT,
Their Att'y.

Said cause is then continued to the present term, whereupon the same is put to a jury duly empanneled and sworn, and after a full hearing of the evidence produced, as well on behalf of the defendant as of the plaintiffs, and the arguments of the respective counsel thereupon, (and the said Hiram O. Alden having then and there, before said cause was finally submitted to the jury, excepted to the opinions, rulings, determinations, and omissions to instruct the jury, as prayed for in his
9 requests, whose exceptions in the premises are allowed, signed, and sealed by the court, and then and there placed on file,) the cause is by the court committed to said jury, who, after mature deliberation thereon had, return their verdict "That the defendant did promise the plaintiffs in manner and form as in their writ and declaration they have alleged against him, and assess damages for the plaintiffs in the sum of six thousand five hundred and seventy-four dollars and twenty-eight cents." All which being seen, and by the court fully understood, it is therefore considered by the court here that the said First National Bank of Chicopee recover against the said Hiram O. Alden the sum of six thousand five hundred and seventy-four dollars and twenty-eight cents, debt or damage, and costs of suit, taxed at one hundred and eighty-eight dollars and twenty-six cents.

Attest:

GEO. F. EMERY, *Clerk.*

10 *Bill of exceptions.*

United States of America, circuit court, first circuit, Maine district, April term, A. D. 1870.

THE FIRST NATIONAL BANK OF CHICOPEE }
v.
HIRAM O. ALDEN. }

Be it remembered, that the above-entitled case came to trial on the sixth day of May, A. D. 1870, upon the general issue.

It was an action of assumpsit against the defendant as endorser of a promissory note, of which the following is a copy, together with the endorsements thereon, viz:

P. N. P., Oct. 3, 1868. Fees, stamp, & protest, $2 28. S. A., N. P.

$6,000 00. WILMINGTON, ILL'S, *April 1st*, 1868.

Six months after date, we promise to pay to the order of Hiram O. Alden six thousand dollars, payable at any bank in Boston, Mass. Value received.

Due Oct. 1–4. EDWARD ALDEN.
J. H. COUSENS.

[Revenue stamps, $3 25.]

(Endorsed:) Hiram O. Alden, W'm A. Ulmer, W'm P. Elliott, cash'r Ames Man'g Co.

The writ, in legal form, is dated October 31, 1868; plea, the general issue; verdict for plaintiff for six thousand five hundred and seventy-four dollars and twenty eight cents. Legal demand of payment upon the makers, their refusal to pay, and protest and notice thereof to the defendant, as endorser, were duly proved.

It appeared in evidence that the defendant, at the date of the
11 note, was and now is a citizen of Belfast, in the State of Maine; that the note in suit was sent to him by the makers, who are citizens of Wilmington, in the State of Illinois, on the 19th of March, 1868, without date or signature, or any written words upon its face, but with the written figures $6,000 thereon, with the request that he would endorse it for their accommodation; that he wrote his name upon the back thereof, and returned it to them; that the said makers filled up the blanks upon the face of said note and negotiated the same to William A. Ulmer, the second endorser thereon, at Chicago, in said State of Illinois, on the first day of April, 1868; that the said note, with the additional endorsements of the said Ulmer and the Ames Manufacturing Company, was discounted by the plaintiff bank, in the usual course of business, on the 13th of April, 1868, without knowledge of any equities between the antecedent parties, or of any fraud connected therewith; that no suit had been commenced against the makers of said note in the State of Illinois, or elsewhere; nor was there any evidence to prove that such a suit would have been unavailing, or that said makers had left the State of Illinois, or absconded therefrom.

Defendant's counsel read the 4th, 7th, and 11th sections of chapter 73, entitled "Negotiable Instruments," of the statutes of Illinois. (Vide Gross, 3d edition, 1869.)

Defendant's counsel contended that by said statutes of Illinois,
12 this action could not be maintained, because the note in suit was obtained from the makers by the misrepresentations, fraud, and circumvention of the said Ulmer, in the sale to them of a worthless patent, and offered evidence tending to prove the same; but the court ruled that this evidence was inadmissable, upon the ground that if proved, such facts would not constitute a valid defence to this action. To this ruling the defendant then and there excepted.

Defendant's counsel also requested the court to instruct the jury that, upon the evidence in this case, the endorsement of the note in suit must be held to have been made at Chicago, Illinois, where it was negotiated and delivered to Ulmer; that in such a case, the statute laws of the State of Illinois are applicable to the contract of endorsement and limit, and qualify it; and that, it not appearing in this case that the plaintiffs (prior to the commencement of this suit) had used due diligence, as required by the statutes of Illinois, to collect said note of the makers by the institution and prosecution of a suit against them for the recovery of the money due thereon; or that such a suit would have been unavailing, or that the said makers had absconded or left the State of Illinois, this action cannot be maintained; but the court declined to give that instruction, and did instruct the jury that, inasmuch as said note is payable in Boston, in the State of Massa-
13 chusetts, the liability of the defendant must be governed by the laws of Massachusetts, which it is not claimed are different from the general rules of commercial law applicable in such cases, and not by the particular statute laws of Illinois, as contended by the defendant. To which rulings, instructions, and refusal to instruct, the defendant then and there excepted; and inasmuch as the foregoing matters do not appear of record, the defendant having reduced the same to writing, requests the court to sign and seal the same; and the court having examined the several matters set forth, and finding the same correct, doth sign and seal the same this sixth day of May, 1870, before the jury left the bar.

NATHAN CLIFFORD, [L. S.]
Associate Jus. Sup. Court U. S.
EDWARD FOX, [L. S.]
U. S. Dis. Judge of Me.

14 *Authentication of record.*

UNITED STATES OF AMERICA,
District of Maine, ss:

I, Geo. F. Emory, clerk of the circuit court of the United States for the district of Maine, hereby certify that the foregoing is a true copy of the record and of all proceedings in the cause of The First National Bank of Chicopee, plaintiffs, against Hiram O. Alden, defendant, in said circuit court determined.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said court this first day of November, in the year of our Lord eighteen hundred and seventy.

[SEAL.] GEO. F. EMERY, *Clerk.*

15 *Citation.*

United States of America, Maine district, ss., first circuit.

The President of the United States of America to the marshal of the district of Maine, or his deputy, greeting:

Whereas in the record and in the judgment of a suit which was determined in our circuit court of the United States for the first circuit, holden at Portland, within and for the district of Maine, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy, between the First National Bank of Chicopee, a corporation, existing by force of the laws of the United States, and having its established place of business at Chicopee, in the Commonwealth of Massachusetts, and citizens of the State of Massachusetts, plaintiffs, and Hiram O. Alden, of Belfast, in the county of Waldo, and State of Maine, and a citizen of said State of Maine, in our district of Maine, defendant, manifest error, it is said, hath intervened to the great damage of the said William O. Alden, as by his complaint we perceive, which record and judgment we, for certain reasons, have caused to be brought before the Supreme Court of the United States, next to be holden at Washington, in the District of Columbia, on the first Monday of December next, in order that the error therein, if any there be, may be duly corrected:

We command you therefore, that you make known to the said First National Bank of Chicopee that they be before our said Supreme Court, to be holden as aforesaid, to hear the record and judgment aforesaid, if they shall see cause, and to do and receive in behalf of the said
16 Hiram O. Alden, whatever the same court shall consider thereupon.

Given under our hand and the seal of our said court this twenty-sixth day of May, in the year of our Lord one thousand eight hundred and seventy.

NATHAN CLIFFORD,
Associate Jus. Sup. Sup. *Court U. S.*

Service.

The First National Bank of Chicopee acknowledges service of the within.

By A. A. STROUT,
Their Att'y.

JUNE 17, 1870.

(Indorsement on cover:) No. 290. Hiram O. Alden, plaintiff in error, vs. The First National Bank of Chicopee. Maine C. C. U. S. Filed 15th November, 1870.

Supreme Court of the United States.

HIRAM O. ALDEN, *Plaintiff in Error,*

v.

THE FIRST NATIONAL BANK OF CHICOPEE.

In error to the Circuit Court of the United States for the District of Maine.

BRIEF OF PLAINTIFF IN ERROR.

BION BRADBURY.

Supreme Court of the United States.

HIRAM O. ALDEN, *Plaintiff in Error,*

v.

THE FIRST NATIONAL BANK OF CHICOPEE.

In error to the Circuit Court of the United States for the District of Maine.

BRIEF OF PLAINTIFF IN ERROR.

This is an action against the plaintiff in error as endorser of a promissory note.

At the inception of the note the plaintiff in error resided at Belfast, in the State of Maine, and has continued to do so ever since.

The makers of the note were citizens of the State of Illinois, residing at Wilmington.

On the 19th of March, 1868, the makers of the note sent it to the plaintiff in error without date or signature, or any written words upon its face, but with the written figures $6,000 thereon, with the request that he would endorse it for their accommodation.

The plaintiff in error wrote his name on the back of the note and returned it to the makers, who completed the note and negotiated it to William A. Ulmer, the second

endorser thereon, at Chicago, in the State of Illinois, on the first day of April, 1868.

This note was subsequently endorsed by Ulmer and the Ames Manufacturing Company, and was discounted by the plaintiff Bank, in the usual course of business, on the 13th of April, 1868, without knowledge of any equities between the antecedent parties or of any fraud connected therewith.

No suit has been commenced against the makers in the State of Illinois or elsewhere; nor was there any evidence to prove that such a suit would have been unavailing, or that the makers of the note had left the State of Illinois or absconded therefrom.

The note was made and negotiated in the State of Illinois; it was payable in the State of Massachusetts.

The important question presented by the facts in this case is, whether the rights and liabilities of the parties are to be determined by the laws of Illinois or the laws of Massachusetts.

1. No principle seems more fully settled and better understood in commercial law than that the contract of the endorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by endorsement is equivalent to the drawing of a new bill, the endorser being in almost every respect considered as a new drawer.

2 Parsons on Notes and Bills, pp. 23–25, note (o).
Chitty on Bills, 142.
3 East. 482, and 2 Burrows 441.
Aymar v. Sheldon, 12 Wendell 439.
Slocum v. Pomeroy, 6 Cranch 289.

2. The contract of endorsement made by the plaintiff in error must be regarded as entered into in the State of Illinois.

The note itself is dated Wilmington, Illinois, though made payable in Boston, which raises the presumption that the endorsement was made there.

2 Parsons on Bills and Notes, pp. 329–330, note (h).

The evidence in this case does not disturb this presumption. This is an accommodation note, the endorsement having been written before the note itself was made or signed. So long as the note remained in the makers' hands there was no liability on the part of the plaintiff in error. This contract must be considered as made *where* the notes were first negotiated and the endorsement became effective. In this case the note was negotiated and delivered to the second endorser, Ulmer, in the State of Illinois.

2 Parsons on Notes and Bills, p. 327.
Cook v. Litchfield, 1 Sandf. (N. Y.) 330.
And affirmed by Court of Appeals, 5 Seld. 279.
Dewolf v. Johnson, 10 Wheat. 267.
Cook v. Moffat, 5 How. 295.

3. The contract of endorsement of the plaintiff in error being new and independent, and having been made in the State of Illinois, the nature and extent of his liabilities are to be determined by the law of that State.

It may be laid down as a general rule that negotiable paper of every kind is construed and governed as to the obligations of the drawer and maker by the law of the country where it was drawn or made; and as to

that of the acceptor by the law of the country where he accepts; and *as to that of the endorser by the law of the country in which the paper was endorsed.*

De La Chaumette v. Bank of Eng., 9 Barn. & Cres. 208.
Allen v. Kemble, 6 Moore, P. C. 314.
Williams v. Wade, 1 Met. 82, 2 Met. 8.
Ackers et al. v. Demond, 103 Mass. 318 (1869).
Aymar v. Sheldon, 12 Wend. 439.
Cranch v. Hall, 15 Illinois 263.
2 Disney (Ohio) 9, Condham v. Smith.
Lenox v. Nelson, 1 Cranch C. C. 170.
Musson v. Lake, 4 How. (U. S.) 262.
Russel v. Buck., 14 Vermont 147.
Dow v. Rowell, 12 A. H. 49.
Bank of Illinois v. Brady, 3 McLean 268, Ibid 397.
Andrews v. Herrick, 4 Cowen 552, Note.
Story on Promissory Notes, § 339.
Story on Bills, § 175, § 177, and Note.
Powers v. Lynch, 3 Mass. 77.
Hull v. Blake, 13 Mass. 155.

In the case of Musson v. Lake, 4 How. U. S. 262, the defendant at Vicksburg, Mississippi, endorsed a bill of exchange drawn there on parties at New Orleans, Louisiana, where it was payable. The Court say (p. 178):

"There is another question entirely independent of the statute and decisions of the Supreme Court of Louisiana, which may be decisive of the case before this Court; and that question is, whether the contract between the holder and endorser is to be governed by the law of Louisiana, where the contract was payable, or by the law of Mississippi, where it was drawn and endorsed. The place where the contract is to be performed, is to govern the liabilities of

the person who has undertaken to perform it. The acceptors resided in New Orleans. They became parties to the bill by accepting it there. So far as their liabilities were concerned, they were governed by the laws of Louisiana. But the drawers and endorsers resided in Mississippi. The bill was drawn and endorsed there; and their liabilities, if any, occurred there. The undertaking of the defendant was, as before stated, that the drawers should pay the bill; and that if the holder, after using due diligence, failed to obtain payment from them, he would pay it with interest and damages. This part of the contract was, by agreement of the parties, to be performed in Mississippi, where the suit was brought, and is now depending. The construction of the contract and the diligence necessary to be used by the plaintiffs to entitle them to recover, must be governed by the laws of the latter State."

And numerous authorities are cited to sustain this view of the law.

In the case of Aymar v. Sheldon, 12 Wend. 439, 1834, the Court say (Nelson J. delivering the opinion):

"That the nature and extent of the liabilities of the drawer or endorser are to be determined according to the law of the place where the bill is drawn or endorsement made, has been adjudged both here and in England. In Hicks v. Brown, 12 Johns, 142, the bill was drawn by the defendant at New Orleans in favor of the plaintiff, upon a house of Philadelphia: it was protested for non-acceptance and due notice given: the defendant obtained a discharge under the insolvent laws of New Orleans after such notice: he was exonerated from all debts previously contracted, and in that State, of course from the bill in question. He pleaded his discharge here and the Court say: 'It seems to be well settled both in our own and the English Court, that

the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans, and had it not been for the circumstance of the bill being drawn in another State, there could be no doubt but the discharge would reach this contract: and this circumstance can make no difference as the demand is against the defendant or drawer of the bill in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans.' "

This action (Aymar v. Sheldon et al., from which I have quoted) was brought upon a bill drawn in the French Island of Martinique, *on parties in Bordeaux, France,* payable to the order of the defendants, a firm in New York, at which place they endorsed it to the plaintiffs, citizens of the United States. The bill was protested for non-acceptance.

The Court, in applying the principles of law to that particular case, say:

"The contract of endorsement was made in this case and the execution of it contemplated by the parties in this State: and it is, therefore, to be construed according to the laws of New York. The defendants below, by it, here engage that the drawers will accept and pay the bill on due presentment, or in case of their default and notice they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn, are equally applicable to the endorser: for in respect to the holder he is the drawer. Adopting this rule and construction, it follows that the law of New York must settle the liability of the defendants below."

In the case of Allen v. Kemble, 6 Moore, P. C. 314, 1844, the Court said:

"It is argued that this bill, being drawn abroad, payable in London, not only the acceptor but the drawer must be held to have contracted according to the English law. This argument appears to us to be founded on a misapprehension of the obligation which the drawer and endorser of a bill incurs. The drawer, by his contract, undertakes that the drawer shall accept and afterwards pay the bill, according to its tenor, at the place and domicile of the drawer. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for the payment of the bill, not where the bill is to be paid by the drawee, but where he the drawer made his contract, with his interest, damages and costs, as the law of the country where he contracted may allow. What, then, is the consequence of altering in the bill itself, or by its acceptance the place at which the acceptor is bound to pay? Can it be more than this, that as to the acceptor the *locus solutionis* is altered, and therefore, *as to him*, the *lex loci solutionis* is altered? But how does this affect the liabilities of the other parties? Their bills are addressed to Mr. Mackie, Shanmaer, Scotland. If no place of payment had been mentioned, they would have been payable by the drawee according to the law of Scotland. London being fixed as the place of payment, they were payable by the drawee according to the law of England: a different law is imported as regards the acceptor, *but not as affects other parties.*"

The contract of endorsement, then, made by the plaintiff in error, was, that if the makers of the note did not pay it in Boston where they undertook to pay it, upon due notice of the dishonor of the note, he would pay the same in Illinois with such interest, damages and

costs, as the law of that State imposed, the nature and extent of his liabilities as endorser to be determined by the laws of that State.

It becomes, therefore, important to ascertain what the law of Illinois is as applicable to this case.

And it may be here remarked, that with regard to promissory notes and bills of exchange, the States of the United States are considered foreign to each other.

2 Parsons on Notes and Bills, pp. 323, 324 and 329.
4 How. 285.

4. What then are the laws of Illinois applicable to the note in suit?

A. By the laws of Illinois, no action can be maintained against the endorser of a promissory note until the maker has been first sued or proved to have absconded, or that a suit would be ineffectual in consequence of insolvency.

Rev. Stat. Ill., 1869, Ch. 73, § 7, p. 462.

The language of the statute is as follows:

"Every assignor or assignors, or his, her or their heirs, executors or administrators, of every such note, bond, bill or other instrument in writing, shall be liable to the action of the assignee or assignees therof, or his, her or their executors or administrators, if such assignee or assignees shall have used due diligence by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill or other instrument of writing, or against his, her or their executors or administrators for the recovery of the money or property due thereon, of damages in lieu thereof: *Provided*, That if the institution of such suit would have been unavailing, or that the maker or makers had absconded

or left the State, when such note, bond, bill or other instrument in writing became due. Such assignee or assignees, or his, her or their executors or administrators may recover against the assignor or assignors or against his or their heirs, executors or administrators, as if due diligence by suit had been used."

Boston v. Walker, 4 Gill. 3.
1 Scam. 47, Ibid 469, 2 Scam. 360. Ibid 355. Ibid 370.
Bledsoe v. Graves, 4 Scam. 384.
Schuttle v. Pratt, 12 Ill. 417.
Peirce v. Strout, 14 Ill. 144.
Crouch v. Hall, 15 Ill. 263 (before cited.)

The Massachusetts case of Wade v. Williams, 1 Met. 82, Ch. J. Shaw, giving the opinion of the Court, recognizes this as the law of Illinois, and decides that the endorser of a note made and endorsed in another State, must do all that is required by the law of that State to charge an endorser, before he can maintain an action against him in this State (Mass).

This was the case of an action against the endorser of a note, in which the endorsement was made in Illinois. The statute cited above was the basis of the defence to the suit. The court held that it was not merely a regulation which affected the remedy, but that the Statute created, limited and modified the contract.

This case is cited by Judge Story in his Conflict of Laws with approbation.

Story's Conflict of Laws, § 316.

In the same work, § 267, Judge Story says:

"Suppose a contract for the debt of a third person, where the law subjected the contract to the tacit condition that payment must be first sought against the debtor or his estate; that would limit the obligation to a more accessorial or secondary character; and it would not be enforced in any foreign country except after a compliance with the requisitions of the local laws. Sureties, endorsers and guarantors are therefore liable every where only according to the place of the contract."

See also Story's Conflict of Laws, §§ 261, 263, 268, 269, 314.

The defendant's counsel requested the Court to instruct the Jury, that, upon the evidence in this case, the endorsement of the note in suit must be held to have been made in Chicago, Illinois, where it was first negotiated and delivered to Ulmer; that in such case, the Statute laws of the State of Illinois are applicable to the contract of endorsement, and limit and qualify it; and that, it not appearing that prior to the commencement of this suit, the plaintiff had used due diligence, as required by the Statutes of Illinois, to collect said note of the makers by the institution and prosecution of a suit against them for the recovery of the money due thereon; or that a suit would have been unavailing; or that the said makers had absconded or left the State of Illinois, this action cannot be maintained.

But the Court declined to give the instruction. It is respectfully submitted that this was erroneous.

B. If a contract in a foreign country be invalid or void by the law of the country where it was made, then

the rule of international law cannot prevail; that the law of the place of performance is to govern.

Pope & al. v. Nickerson, 3 Story C. C. p. 484.

In this case Judge Story says:

"But when it is said that the law of the place where a contract is to be performed is to govern, and not the place where the contract is entered into, we are to understand this rule of international law with all its proper qualifications and limitations. In the first place, the rule cannot prevail or be obligatory, where the very contract in the form in which it is made, although to be performed or executed in a foreign country, is pronounced invalid or void by the law of the country in which it is made. In the next place, if a contract is to be performed in one country and partly in another, it admits a double aspect; nay, it has a double operation and is, as to the particular parts, to be interpreted distinctively: that is, according to the laws of the country where the particular parts are to be performed."

Akers & al. v. Demond, 103 Mass. 318, 1869.

In this case the holder of two bills of exchange brought his action against the acceptor. The bills were first negotiated in New York, but they were addressed to the defendant in Boston and were accepted by him there. The defence was that the bills were void for usury under the laws of New York. The Court say:

"The difficult question in this case arises from the fact that the paper was made payable in Boston. It is contended that the contract of the acceptor is to be governed by the law of the places where the bills are made payable. The general principle is that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract and to the rights and obliga-

tions of the parties under it. But the question of its validity, as affected by the legality of the consideration or of the transaction upon which it was founded, and in which it took its inception as a contract, must be determined by the law of the State where that transaction was had. No other law can apply to it. * * * * But where a usurious or other illegal consideration is declared by the laws of any State to be incapable of sustaining any valid contract, and contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and every-where. They never acquire a legal existence. Contracts founded on usurious transactions in the State of New York are of this character."

12 Pick. 565, and 2 Met. 8.

"The fact that the bills now in suit were accepted in Boston and were payable there, does not exempt them from the operation of the laws of New York. These were mere 'nude pacts,' with no legal authority or force as contracts until a consideration was paid. The only consideration ever paid was the usurious loan made by these plaintiffs in New York. That there was the legal inception of the alleged contracts."

1 Met. 108. 9 N. Y. 279. 22 N. Y. 312. 1 Hill 1.

"By the statutes of New York, that transaction was incapable of furnishing a legal consideration, and so far as the bills depend upon that they are absolutely void. The original validity of such a contract must be determined by the law of the State in which it was first negotiated or delivered as a contract."

9 Porter 9. 13 Peters 65. 1 Wallace 298. 33 N. Y. 615.

By the law of Illinois the note in suit was void in its inception, because it was obtained from the makers by misrepresentation, fraud and circumvention.

In the case of Mobby v. Ryan, 14 Ill. 51, it is decided that:

"It is a good defence to a note in the hands of a *bona fide* assignee (endorser) that the execution thereof was obtained by fraud."

In Cranch v. Hall, 15 Ill. 263, it is decided that the liability of the assigner (endorser) of a note assigned (endorsed) in this State, will be governed by the laws of the State.

The statutes of Illinois (Rev. Stat. 1869, p. 462, § 11, Chap. 73, entitled negotiable instruments) enact:

"If any fraud or circumvention be used in obtaining the making or executing any of the instruments aforesaid, such fraud and circumvention may be pleaded in *bar* to any action to be brought on any such instrument so obtained, whether such action be brought by the party committing such fraud or circumvention, or any assignee (endorser) or assignees (endorsers) of such instrument."

The statute above cited applies to all negotiable instruments. The word assignors, applied to a negotiable note, has the meaning of endorser.

Rev. Stat. Ill., ch. 73, § 4.

It appears by the bill of exceptions in this case, that the defendant offered to prove that the note in suit was obtained by misrepresentations, fraud and circumvention, but the evidence was excluded upon the ground that if these facts were proved it would constitute no defence to the suit. It is respectfully contended that this ruling was erroneous.

5. The Court did instruct the Jury, that inasmuch

as said note is payable in Boston in the State of Massachusetts, the liability of the defendant must be governed by the laws of Massachusetts, which it is not claimed are different from the general rules of commercial law applicable to such cases, and not by the particular statutes of Illinois as contended by the defendant.

This instruction is based upon the idea that the fact that the note was made payable in Boston, changes entirely the liabilities of the endorser under his contract of endorsement, and the rights of the holder of the paper.

If the note in suit had been made payable at Wilmington, Illinois, where it purports on its face to have been made, and where it had its legal inception, would there be any doubt that this action could not be maintained in Massachusetts or Maine?

How is it changed, so far as the endorser is concerned, by the fact that it is made payable in Massachusetts?

I have endeavored to maintain the following propositions, which seem to me to be sustained by the authorities:

1. That the contract of endorsement is a new and independent contract between the holder and the endorser.

2. That the contract of the endorser is, that the *maker* of the note shall pay it according to its tenor, at the place where he has agreed to pay, and that if the maker shall fail to fulfill his contract and pay the note as he has stipulated, he will pay it, not where the

maker may have agreed to pay it, but where he (the endorser) made his contract, with such interest, damages and costs, as the law of the place where he made his contract will allow, the law of that place governing as to the nature, validity, construction and effect of such contract, and the nature and extent of the rights and liabilities of the parties to it.

3. The endorsement in this case must be held to have been made in the State of Illinois.

4. That by the laws of Illinois, this action could not be maintained in that State nor upon the principles of the *lex loci contractus* in any other State.

If these propositions be correct, the maker of this note has one contract, the endorser another: the maker has undertaken to perform his contract in Massachusetts, the endorser to perform his in Illinois. The liability of the endorser is contingent upon the failure of the maker to perform his contract in Massachusetts, and if he fail to perform it, the endorser becomes liable to perform his contract in Illinois. How, then, can the contract of the maker to perform in Massachusetts affect that of the endorser, which he is to perform in Illinois? Either the law of the place of making the contract or of the place of its performance is to control the liability of the endorser. In this case both are in Illinois.

5. To give full effect to the local laws of the different States in the National Courts and in the Courts of the sister States, is in accordance with the theory of our institutions.

The habits of thought and diversified material interests of the people of the different States have led to the establishment of variant systems of laws, touching the subjects of contracts, including negotiable paper, over which they have the entire control as sovereign States, except so far as restrained by the constitutional provision that no State shall pass any law impairing the obligation of a contract.

The applications of the doctrine that the *lex loci contractus*, shall prevail in determining the nature and extent of the rights and liabilities of parties to contracts upon the broad principle of international comity, secures to each State its local rights in the enactments of its laws.

The application of the *lex fori* to the enforcement of contracts where a remedy is sought elsewhere than the place of making the contract, is also in harmony with our system.

There can be no serious injury or inconvenience result to the commercial interests of the country by the adoption of this principle.

If, as in this case, a negotiable note dated at Wilmington, Illinois, be put into circulation in Massachusetts, it carries upon its face the evidence that it had its inception in that State of Illinois, and affords notice that the liabilities and obligations of the parties to it are to be determined by the local laws. The purchaser of the note is bound to know the local law, or if, in violation of the maxim *caveat emptor*, he chooses to take the note as in this case, upon the credit of a home endorse-

ment, he does so at his own risk as to the liabilities of the foreign endorsers of the note.

The general principle underlying the whole matter is, that a contract valid at the place of making is valid every-where; and if invalid there is invalid every-where.

I am well aware that the Courts, from considerations of commercial policy, are inclined to protect the innocent holder of negotiable paper taken for value in the usual course of business.

But is it not equally important that the rights of the States over the subject matter of contracts should be fully recognized, and that all fraudulent contracts should receive the stamp of judicial reprobation?

Nor is the rule absolute, that a *bona fide* holder of a negotiable note shall in all cases be protected.

By the law of England, of Massachusetts and New York, illegality of consideration is a good defence against a *bona fide* holder of negotiable paper, if the consideration be declared illegal by the statutes of the State whose laws determine its construction and validity.

Why, then, should not the statutes limiting and modifying the liabilities of parties under contracts, be as much respected as those declaring them illegal? Why should not actual fraud, which destroys all contracts, taint negotiable paper as well as statute illegality? If an usurious note, a gaming note, a Sunday note, a slave trade note, are not protected in the hands of a *bona fide* holder, why a note obtained by actual circumvention and fraud? Where is the difference in principle or in policy?

If, by the laws of the State of Maine, the endorsement of the payee of a negotiable note has only the effect to give negotiability to the paper without making him liable for its payment in any contingency, why should not the law of Maine determine the character of that contract everywhere upon the well established principles of the *lex loci contractus?*

But in this case, it is contended that the note in suit falls within the principles laid down in the case of Akers & al. v. Demond, 103 Mass., and is made void by the statutes of Illinois.

If usury in New York renders a note invalid, why not fraud and circumvention in Illinois?

T J D Fuller

BERRY, PRINTER, PORTLAND.

HIRAM O. ALDEN, Plaintiff in Error,

vs.

THE FIRST NAT'L BANK OF CHICOPEE.

Brief of Defendant in Error.

Supreme Court of the United States.

DECEMBER TERM, 1871.

HIRAM O. ALDEN, *Plaintiff in Error,*

v.

THE FIRST NATIONAL BANK OF CHICOPEE.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

BION BRADBURY.

Supreme Court of the United States.

DECEMBER TERM, 1871.

HIRAM O. ALDEN, *Plaintiff in Error*,

v.

THE FIRST NATIONAL BANK OF CHICOPEE.

REPLY TO BRIEF OF DEFENDANT IN ERROR.

1. There are many points of agreement between the counsel in this case.

a. That if this contract of endorsement is to be construed and controlled by the law of Massachusetts, the defendant in error must prevail; if by the laws of Illinois, the plaintiff in error is entitled to recover.

b. That, as a general rule, the *lex loci contractus* determines the nature, validity, construction and effect of the contract, and the character and extent of the rights and obligations of the parties to it.

c. That there is an exception to this rule, to wit: That where a place of performance is named in the contract, the law of the place of performance in like manner applies to it.

d. That, in this case, as between the makers of the note and the holder, the law of Massachusetts controls.

2. While it is conceded that (this note being made payable in Boston) the contract of the makers is to be performed there precisely as if the note had been a bill of exchange accepted payable in Boston, and that the construction and legal effect of the contract, so far as they are concerned, are to be determined by the law of Massachusetts, it is alleged that this exception to the general rule does not apply to the endorser because his is a new, distinct and independent contract.

The counsel for the defendant in error, admitting that the contract of endorsement is a new and independent contract, contends that the reason upon which this principle of law is based fails in this case because "the endorsement was made prior to the original delivery of the note; and, therefore, the principle falls with the failure of the reason of it."

This is not quite apparent.

There can be no difficulty in defining the relative legal positions of the parties to this note.

The makers of the note represent both the drawer and acceptor of a bill. They are regarded as having drawn a bill and accepted it at the date of the drawing. The contract, as expressed in the note, was with the payee. It is extended by implication to all who may become parties to it afterwards. When the blank note was filled up and made payable to the plaintiff in error, his rights and liabilities attached (except as between him and the makers) in the same manner as if the note had been originally extended and passed to him

in the regular course of business, and he had endorsed and negotiated it.

If, after his endorsement in blank, the note had been filled payable to another person than himself, his liability would have been that of an original promissor, but being made payable to him he stands in the position of simple endorser.

When Ulmer received the note (endorsed), the legal relations of the makers and the endorser to the note and to him were fixed and established by the written instrument itself, which embodied the contract of each party to the note, with all the legal implications attaching to each party.

The makers were bound absolutely to pay the note at maturity in Boston. The endorser, after presentment in Boston and a refusal to pay by the makers, upon protest and due notice, was bound to pay the amount with interest and damages at the place where he made his contract.

How, then, can it be said that the making the endorsement prior to the original delivery of the note prevents the inception of the new contract of the endorser?

It seems quite absurd to say that if the payee of a note endorses it prior to its original delivery, his endorsement ceases to be a new and independent contract.

3. If, then, the contract of endorsement in this case was new, distinct and independent, the question arises, What is that contract—what are the legal implications arising from the endorsement?

Here the parties are directly at issue. The defendant in error contends that the place of payment named in the note is as much a part of the endorser's contract as any other provision of the instrument, and that the endorser is bound to fulfill the contract *in all particulars*, if the makers do not.

The plaintiff in error contends that the place of payment is no part of the contract of the endorser; that he is not required to pay the note in Boston at maturity; that his undertaking is not to pay absolutely at any time or place, but only upon a contingency; that upon refusal of the makers to pay the note according to its tenor, after demand and protest, the endorser shall pay the amount of the note, with interest and damages, at the place where he made his contract; that the contract of endorsement is not within the exception to the general rule of the *lex loci contractus*.

This position of the plaintiff in error is fully sustained by the case of Allen v. Kemble (cited in the brief of the plaintiff in error), and is there very clearly and cogently stated.

Now, the counsel for the defendant in error concedes that if no place of payment had been named in the note, the endorser impliedly would have agreed that the maker should pay it *generally*, and that upon the maker's default he would himself pay it *generally*; "that is, in the place where his contract is made." But there are still the two different contracts of the maker and endorser involved in the note. And the question arises, what law determines the rights and

obligations of the respective parties to the note? The answer must be the *lex loci contractus!* And the place of endorsement, *when proved*, controls and regulates the contract of the endorser.

The counsel for the plaintiff in error further concedes, that if a bill be drawn upon a person addressed to him at a place named, it does not import an undertaking by the endorser to pay it there, but that, on the contrary, the contract of the endorser upon such a bill is impliedly to be performed where it is made. Now, if a bill be drawn, addressed to the drawee at a particular place, which is supposed to be his place of business, and it is presented to him and accepted there, the bill becomes payable there, and the acceptor is bound to perform his contract there, just as much as if he had written upon the face of the bill, "Accepted, payable at A." It is admitted that the law of the place of acceptance would not control the prior endorser of the bill; yet it was in the contemplation of drawer and endorser that the bill would be paid at the place of acceptance. Would the subsequent endorsers, if the bill were negotiated after acceptance, be bound by the law of the place of acceptance? This would not be contended.

In Allen v. Kemble, the Court say: "Their bills are addressed to Mr. Mackie, Shanmaer, Scotland." "*If no place of payment had been mentioned, they would have been payable by the drawee according to the law of Scotland.*" But the drawee accepted the bills payable in London, then the drawee became liable according to the law of England. In this case the drawer resided

in Demerara, and the Court held that his contract was controlled by the law of that place.

A, in Iowa, draws a bill upon B addressed to him in Massachusetts, and accepted by him in favor of C, in Illinois, who endorses it there.

A similar bill, on the same parties is made with the single exception, that Massachusetts is named in the bill itself as the place of payment.

The place of performance of the acceptor's contract is the same in each of these bills, Massachusetts.

Now, the learned counsel for the defendant in error contends, that in the former bill, C, the Illinois endorser, does not undertake to pay in Massachusetts, but is to perform his contract in Illinois, while in the latter the same endorser does undertake to pay in Massachusetts, and is not to perform in Illinois. Where is the distinction?

It is just as much the understanding of the Illinois endorser that the one bill is to be paid in Massachusetts as the other, and why, if it is a part of his contract to pay in Massachusetts in the one case, is it not in the other?

In the case at bar the makers of the note stand just as if they had drawn a bill upon themselves and accepted it payable in Boston. They thereby fix the place of the performance of their contract: but this does not modify or change the new contract of the endorser.

4. It is said by the counsel for the defendants in error that in all the cases which hold that the endorser

cannot be charged without a compliance with the law of the place of endorsement, there is no place of payment expressly provided in the note or bill.

But it will be found that in the majority of the cases brought upon bills, the bill is addressed to the drawee at his place of business, which is equivalent to naming a place of payment in the bill, because its acceptance there makes that the place of performance.

In the case of Akers & al. v. Demond (103 Mass.), the bill was drawn in New York and accepted in Boston. The suit was against the acceptor. The Court say: That bills now in suit were accepted in Boston and are payable there does not exempt them from the operation of the laws of New York. These were mere nude pacts, &c.

In the case of Allen v. Kemble, Prof. Greenleaf (2 Green. Ev. § 153), recognizing it as good law says: "A drew a bill in favor of B (both residents of Demerara), upon C, resident in Scotland, who accepted it payable in London: and *B endorsed it to D*, who afterward became bankrupt. When his acceptance became due he held a bill of exchange accepted by D. An action being brought in Demerara by D's assignees against A and B, upon the bill, it was held, that the Roman-Dutch law, prevalent in Demerara, and not the law of England must control the case: and that according to that law the defendants were at liberty to plead D's bill as a compensation *pro tanto* for the bill in suit."

5. It is contended that the case of Bissel v. Lewis, 4 Mich. 450, fully covers the case at bar.

This was an action brought in Michigan upon a bill drawn under the authority of a letter of credit written in New York upon the party giving the letter, at his place of business in New York. The action was against the drawer of the bill, who had refused to pay it. The marginal note is "Held that as the law of the place whence the letter of credit was sent, and where the drafts were to be payable, controlled the obligations of the writer of the letter, such letter, by the settled rule of New York, was an unconditional acceptance, and should be so construed here (Michigan)."

In this case the letter of credit was made in New York. The drafts were drawn upon the writer in New York. He was to pay there. The place of the making and the performing of the contract was in New York. He had by his letter made himself the acceptor of a draft payable in New York.

The general principle of the *lex loci contractus* applies to the case beyond doubt; but there is no intimation as to the liability of an endorser upon such a draft.

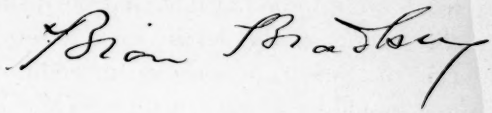
The case, as far it goes, sustains the law as alleged by the plaintiff in error.

6. It is not denied, by the counsel for the defendant in error, that the damages upon a protested bill to be recovered by the holder against the endorser, conform to the law of the place of endorsement, even when the bill is made payable at a particular place.

In the case of the Bank of the United States v. the United States (2 Howard 711), it is decided that dam-

ages are allowed on bills as a compensation for not obtaining the money at the place stipulated, and not by way of penalty.

7. Discuss the proposition "that the interests of the community demand that all parties to commercial paper should be bound by the law of the place where they have in terms made it payable."



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